Conoco, Inc. *and* Oil, Chemical and Atomic Workers International Union, and its Local 5-857, AFL–CIO. Case 17–CA–17040

July 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On June 21, 1994, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel and the Charging Party filed exceptions with briefs in support and the Respondent filed cross-exceptions with a brief in support and an answering brief. Thereafter, the Charging Party filed an answering brief to the Respondent's cross-exceptions and a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue here is whether the Respondent violated Section 8(a)(5) within the meaning of Section 8(d) of the Act by expanding the number of progression units set out in the collective-bargaining agreement between the parties without first obtaining the consent of the Union. For the reasons set out below, we reverse the judge and find that the Respondent violated Section 8(a)(5) by so doing.

I. FACTUAL BACKGROUND

The judge has fully set out the facts. In brief, the Respondent is an oil company with facilities worldwide, including a facility at Ponca City, Oklahoma, the only facility at issue here. The Union represents virtually all the Ponca City facility employees in a bargaining unit of some 600 employees that includes the employees at issue here, the approximately 160 employees in the facility's Operations Technology and Support (OT&S) Department.[2] OT&S employees are divided into ''progression units'' for purposes of determining seniority. While the number of progression units has varied, the present collective-bargaining agreement, effective March 31, 1993, to March 31, 1996, provides for three such units. In July 1993, shortly after the agreement went into effect, the Respondent told the Union that it intended to replace the three progression units provided for in the collective-bargaining agreement with six different progression units. After the Union objected, the parties met on several occasions to discuss the matter. Although the Union remained opposed to the Respondent's plan, in October 1993 the Respondent expanded the number of progression units from three to six without the consent of the Union.

II. THE JUDGE'S DECISION

Citing *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971),[3] for the proposition that Section 8(d) of the Act requires an employer to obtain the union's consent before it ''seeks to proceed in a manner inconsistent with the terms of a collective-bargaining agreement that is then in effect . . . if the employer's proposed action concerns a mandatory subject of bargaining,''[4] the judge initially found, and we agree, that the expansion of the number of progression units from three to six concerned a mandatory subject of bargaining because it affected seniority and therefore had a potential effect on employees' hours, pay, and risk of layoff. The judge went on to find no violation, however, because he found that the Respondent's obligation to retain the three progression units in force was not ''contained in'' the contract as required under Section 8(d).[5]

In reaching his conclusion, the judge first observed that the words ''As of April 1, 1993,'' in article 20–1 of the collective-bargaining agreement, the article that the Respondent was alleged to have violated,[6] could be interpreted in either of two ways, to define ''a specific time'' or to define ''a starting point.'' As

[1] We deny the Union's request to disregard the Respondent's second and third exceptions.

[2] The Union separately represents a small unit of clericals at the Ponca City facility. That unit is not in issue here.

[3] Here and elsewhere in his decision, the judge also cited *Tel-Plus Long Island*, 313 NLRB No. 47 (Nov. 26, 1993). This unpublished decision is reported at 145 LRRM 1158.

[4] Sec. 8(d) of the Act provides, inter alia, that ''the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provision of the contract.''

[5] As the Board explained in *Milwaukee Spring II*, 268 NLRB 601, 602 (1984) (footnotes omitted):

> Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to ''wages, hours, and other terms and conditions of employment'' . . . before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to ''modif[y] . . . the terms and conditions contained in the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not ''contained in'' the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

[6] Art. 20–1 states in relevant part that ''As of April 1, 1993, the Operations Technology and Support Department shall be divided into the following progression units.'' The provision then sets out the three progression units that were effective April 1, 1993. The definition of these progression units is set out by the judge in his decision.

to the former, the judge opined that ''as of April 1, 1993,'' could mean, as the Respondent contended, that the parties agreed only that the Respondent should have the three progression units in place by that specific date, but that thereafter the Respondent was free to use different progression units. As to the latter, the judge observed that ''as of April 1, 1993,'' could mean, as the General Counsel and the Union contended, that the three progression units became effective April 1, 1993, and that the Respondent was not free, absent the consent of the Union, to use a different number of progression units after that date.

Finding that the meaning of the term ''as of'' was not clear from the context, the judge observed that ''the question to answer is what [meaning] Conoco and the Union intended the term to have when they used it in the agreement.'' The judge reasoned that although the term could have the meaning urged by the General Counsel and the Union, such an interpretation was ''improbable'' and found instead that the words ''as of'' meant, as the Respondent contended, that the Respondent was obligated to have the three progression units in place on April 1, 1993, but was not obligated to maintain them thereafter. Having found that ''as of'' means on April 1, 1993, but not thereafter, the judge opined that the reason the parties negotiated the provision to be effective for only 1 day was

> as a way of effectuating Conoco's interest [as set out in Article 11 of the contract's management-rights clause] in being able to rearrange all facets of OT&S whenever it cho[se] while, at the same time, honoring what surely would be an interest of the Union in specifying the progression units the parties contemplated as being in effect as the contract term got under way.

Accordingly, the judge found that the Respondent did not violate the Act because there was no provision ''contained in'' the contract that forbade the Respondent from changing the number of progression units after April 1, 1993.

Relying on *NCR Corp.*, 271 NLRB 1212, 1213 (1984), the judge went on to find no violation on the additional ground that since there were two equally plausible interpretations of article 20–1 and the Respondent had a reasonable basis under its interpretation to take the action alleged as unlawful, the Board would ''not enter the dispute to serve the function of arbitrator in determining which party's interpretation [was] correct.'' Thus, for both these reasons the judge dismissed the complaint.

Finally, noting that his dismissal of the violation alleged hinged entirely on his interpretation of the words ''as of April 1, 1993,'' the judge considered whether the Respondent would have violated Section 8(d) if one assumed that, as the General Counsel and the Union contended, article 20–1, standing alone, meant that effective April 1, 1993, the Respondent was required to utilize the progression units set out in the contract and was not free to change them absent the consent of the Union. The judge concluded that under this assumption the Respondent's change in the number of progression units would have been contrary to the Respondent's obligations under the contract and therefore a violation of Sections 8(a)(5) and 8(d). In reaching this conclusion, the judge first found that although the management-rights clause, standing alone, did give the Respondent the ''responsibility'' to ''[d]etermine and to redetermine the organization'' of OT&S, it did not give the Respondent the right to rearrange the order of employee seniority as set out in the progression units. In this regard, the judge observed that it was the Respondent's burden to show that the parties intended the management-rights clause to override the requirements of article 20–1 of the collective-bargaining agreement and found that the Respondent had failed to carry that burden.

The judge also considered and rejected the Respondent's contention that articles 26–5 and 26–6 of the collective-bargaining agreement must permit the Respondent to divide progression units without the Union's consent.[7] While observing that article 26 appeared to allow the Respondent to combine progression units without the Union's consent, the judge found ''unpersuasive'' the Respondent's argument that those same provisions must allow the Respondent to divide progression units without the Union's consent. In this regard, the judge observed that combining progression units had very different effects from splitting them. He also noted that the absence of any discussion of the Respondent's right to split progression units might mean that the parties had previously considered and rejected that idea.

Finally, the judge also rejected the Respondent's assertion that its history of making midterm changes in progression units proved that it had the right to make such a change here. In finding this argument without merit, the judge observed that on one occasion the Respondent had combined progression units without the consent of the Union, but that this was permitted under article 26 of the collective-bargaining agreement. The judge further observed that while on one prior occasion the Respondent had split the number of progression

[7] Art. 26 is entitled ''Staffing.'' Arts. 26–5 and 26–6 read as follows:

> 26–5 When one or more progression units in whole or in part are combined with one or more other progression units, employees shall be ranked in the surviving progression unit on the basis of their regular, full-time employment date in the Operations Technology and Support Department . . .
>
> 26–6 When the Company has determined that conditions exist which necessitate the application of Article 26–5, they [sic] will meet with the Union to explain the situation.

units, it had done so only after obtaining the consent of the Union.[8]

III. CONTENTIONS OF THE PARTIES

The General Counsel and the Charging Party argue that the judge erred in finding that the words ''as of April 1, 1993'' contained in article 20–1 of the collective-bargaining agreement should be interpreted to mean on April 1, but not necessarily thereafter. The General Counsel and the Charging Party also except to the judge's finding that the term ''as of'' is capable of two equally plausible interpretations and that therefore, under the Board's holding in *NCR Corp.*, supra, the Respondent's splitting of the progression units without the consent of the Union did not violate the Act. The Respondent excepts to the judge's finding that article 11 of the collective-bargaining agreement, the management-rights clause, does not, standing alone, permit the Respondent to split the number of progression units without the Union's consent.

IV. DISCUSSION

We find merit in the General Counsel's and the Charging Party's exceptions and, for the reasons set out below, reverse the judge and find that the Respondent violated Section 8(a)(5) and 8(d) of the Act by dividing the number of progression units in October 1993 without the consent of the Union.

To resolve the issue presented here, whether the Respondent violated Section 8(a)(5) and 8(d) by splitting the number of progression units set out in article 20–1 of the current collective-bargaining agreement without the consent of the Union, we must determine what the Respondent and the Union intended the term ''as of April 1, 1993'' to mean in article 20–1.[9] As the Board stated in *Mining Specialists*, 314 NLRB 268, 268–269 (1994):

> In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. [Footnotes omitted.]

In his own interpretation of article 20–1, the judge relied on four reasons to find that it was ''improbable'' that the parties intended the term ''as of'' to mean effective April 1, 1993: (1) that the agreement was effective at noon on March 31, ''a scant 12 hours before the as-of date.''; (2) that the progression units that were in place when the agreement went into effect were substantively identical to the progression units set out in the agreement; (3) that the term ''as of'' was used in the first collective-bargaining agreement between the parties and has been used in each collective-bargaining agreement since then; and (4) that the two places that the parties ''unambiguously'' intended to communicate ''becomes effective,'' they used the term ''effective.''

In our view, the judge erred by finding it significant that the date of article 20–1 was different from, and only a ''scant'' 12 hours after, the effective date of the contract and that the parties did not use the term ''effective'' in article 20–1 to clarify the use of the term ''as of.'' Contrary to the judge, we find that the only plausible interpretation of the term ''as of April 1, 1993'' is that urged by the General Counsel and the Union, that article 20–1 was effective as of April 1, 1993, and thereafter.

In reaching this conclusion, we observe that, as the judge himself emphasized, in the first collective-bargaining agreement between the parties, article 2, the seniority provision equivalent to article 20–1 in the 1993 contract, provided that ''[a]s of April 30, 1971,'' the Research and Development Department would be divided into four progression units. However, the collective-bargaining agreement was effective the same date, April 30, 1971—without the 12-hour or other difference in timing which the judge emphasized in the 1993 contract. By the judge's own logic, then, the parties must have intended the term ''as of'' in article 2 to mean ''effective as of April 30, 1971,'' the effective date of the contract. Accordingly, we find that in the initial contract the term ''as of'' in article 2 meant ''effective as of April 30, 1971.'' Thus, this factor supports the General Counsel's and the Union's interpretation of the term ''as of'' in article 20–1.

We must then decide whether the difference between the date set out in article 20–1 of the 1993 agreement (''[a]s of April 1, 1993'') and the effective date of that agreement (Mar. 31, 1993) somehow alters the meaning of the term ''as of'' from that which the parties intended in 1971. We conclude that it does not. In reaching this conclusion, we emphasize that the parties have entered into 10 collective-bargaining agreements after the 1971 agreement and that in none of those agreements is the date set out in the relevant ''Senior-

[8] The judge also considered and rejected the Respondent's contention that it was not required to bargain over splitting the number of progression units because its decision to divide them involved a change in the scope and direction of the Respondent's operations. We agree with the judge that the Respondent's decision to split the number of progression units did not involve a change in the scope and direction of the Respondent's business. Therefore, the Respondent may not rely on *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), to escape liability here.

[9] It is well settled that the Board has the authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. See *Mining Specialists*, 314 NLRB 268, 268 fn. 5 (1994), and cases there cited.

ity'' provision the same as the effective date of the contract in which it is contained.[10] Yet until now neither the Respondent nor the Union has ever contended that this disparity in dates evidences the parties' intent to change the meaning of the term ''as of'' from that which the parties intented in the 1971 agreement. Thus, the collective-bargaining agreements in evidence convince us that by the term ''as of'' in article 20–1 of the 1993 agreement the parties intended that article 20–1 would be ''effective as of April 1, 1993 and thereafter.'' Accordingly, since we conclude that the Respondent's obligation to maintain three progression units is ''contained in the contract,'' we find that the Respondent could not divide the number of progression units set out in article 20–1 during the term of the contract without the Union's consent.

In reaching this conclusion, we have also considered and find without merit the judge's alternative ground for dismissing the complaint, that the term ''as of'' in article 20–1 is capable of two equally plausible interpretations and that the Board, for the reasons set out in *NCR Corp.*, supra, will not, in effect, act as an arbitrator in such circumstances. As set out above, we have found that the parties intended the term ''as of'' to mean ''effective as of'' and that the judge's analysis that led to a different conclusion will not survive scrutiny. We also find that the judge's explanation as to why the Union would agree to have article 20–1 effective for only 1 day, April 1, 1993, but not thereafter, further evidences the inherent implausibility of his interpretation. In this regard, as explained above, the judge opined that the parties intended ''as of'' to mean ''on April 1, 1993 but not necessarily thereafter'' to allow the Respondent to arrange all facets of its OT&S operation whenever it chose, while honoring the Union's interest in specifying the number of progression units in effect at the commencement of the contract term. We find this rationale implausible. For if the Union had an interest in specifying the number of progression units at the commencement of the contract term, and the progression units, as the judge himself found, concern such fundamental matters of employment as seniority and layoffs, we fail to understand why the Union, having taken the trouble to define the number of progression units in the contract, would cede to the Respondent total control over the number of progression units, and thus over seniority and the order of layoffs, after the first day of the contract term. Such an interpretation would, in effect, render article 20–1 a nullity. Since it is axiomatic that parties to a collective-bargaining agreement do not intend to agree to a nullity, we find the judge's interpretation of the term ''as of'' inherently implausible.

Finally, we agree with the judge, for the reasons stated by him, that the management-rights clause of the contract, standing alone, and the parties' bargaining history do not support the Respondent's argument that it was free to expand the number of progression units without the consent of the Union even if the term ''as of'' had the meaning urged by the General Counsel and the Union. For all these reasons, we find that the Respondent was not free to expand the number of progresssion units during the term of the current agreement absent the consent of the Union and that it violated Section 8(a)(5) within the meaning of Section 8(d) by expanding the number of progression units from three to six on October 1, 1993.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Oil, Chemical and Atomic Workers International Union and Local 587 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Union is the designated and recognized collective-bargaining representative of certain of the Respondent's employees, including its OT&S Department employees, at its Ponca City, Oklahoma facility and those employees are included in a unit described in the current collective-bargaining agreement between the Respondent and the Union which was entered into in 1993.

4. The Respondent has violated Sections 8(a)(5) and 8(d) of the Act by expanding the number of progression units set out in the current collective-bargaining agreement between the parties without the consent of the Union.

5. The aforesaid violation of the Act is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) of the Act, we will require it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to restore the three progression units set out in the 1993 collective-bar-

[10] In the three agreements that the parties entered into subsequent to the 1971 agreement and whose effective dates were respectively May 14, 1973, June 24, 1975, and March 7, 1977, article 2, the ''seniority'' provision, began ''[a]s of April 30, 1971.'' In the next contract, effective March 5, 1979, art. 2 began ''[a]s of March 1, 1979,'' some four days before the effective date of the 1979 contract. The March 1, 1979 date was repeated in art. 2 in the three following contracts whose effective dates were respectively March 1, 1982, April 14, 1984, and March 10, 1986. The following contract was effective January 13, 1989, but the ''Seniority'' provision of the 1989 contract, now art. 20, began ''[a]s of June 9, 1987.'' Art. 20 of the next contract, effective March 31, 1990, also began ''[a]s of June 9, 1987.'' In the latest contract, the 1993 agreement at issue here, art. 20 begins, as explained above, ''[a]s of April 1, 1993'' while the effective date of the contract is March 31, 1993.

gaining agreement and that were in place prior to the Respondent's unlawful expansion of those progression units on October 1, 1993. We shall also order the Respondent to make its employees whole for any loss of wages suffered by virtue of the Respondent's unlawful expansion of the number of progression units with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Conoco, Inc., Ponca City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing mandatory terms of collective bargaining that are contained in the current collective-bargaining agreement without the consent of the Union.

(b) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Restore the progression units described in the 1993 collective-bargaining agreement and maintain those progression units during the term of the contract unless the Union consents to their expansion.

(b) Make whole the unit employees for any wages lost as a result of its failure to comply with the terms of the collective-bargaining agreement.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Ponca City, Oklahoma, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT change mandatory terms of collective bargaining that are contained in the current collective-bargaining agreement without the consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL restore the progression units set out in the 1993 collective-bargaining agreement and maintain those progression units during the term of the agreement unless the Union agrees to their expansion.

WE WILL make our employees whole for any loss of wages as a result of our failure to comply with the terms of the collective-bargaining agreement.

CONOCO, INC.

Mary Taves, Esq., for the General Counsel.
Terry S. Bickerton, Esq., of San Antonio, Texas, for the Respondent.
Kathleen a. Hostetler, Esq., of Lakewood, Colorado, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. Conoco, Inc. is an oil company. It operates on a worldwide scale.[1] We are here concerned with only one of Conoco's facilities, the one in Ponca City, Oklahoma. And of the Ponca City facility's 610 or so employees, our focus is solely on the approximately 160 employees in the facility's Operations Technology and Support Department (OT&S). Virtually all the employees at the Ponca City facility (including the OT&S employees) are represented by the Oil, Chemical and Atomic

[1] Conoco admits that it is an employer engaged in commerce and that, accordingly, the Board has jurisdiction over this matter.

Workers International Union (OCAW) and its Local 5-857, AFL–CIO (the Union).[2]

Conoco and the Union are parties to a collective-bargaining agreement that, by its terms, is effective for the period March 31, 1993, to March 31, 1996 (the agreement). For many years OT&S' employees have been divided into ''progression units'' for purposes of determining seniority, with the number of progression units varying from time to time. Three progression units are spelled out in the agreement.[3]

In July 1993, 2-1/2 months after the agreement went into effect, Conoco told the Union that the Company intended to replace the three progression units to which the agreement refers with six different ones.[4] The Union objected, and representatives of Conoco and the Union met on a number of occasions to discuss the matter. The Union's representatives remained opposed to the Company's plan. Nonetheless, in October 1993 the Company did expand the number of OT&S progression units to six, doing so without the consent of the Union.[5]

The General Counsel and the Union contend that by changing the progression units without first obtaining the consent of the Union, Conoco violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act).[6]

The Effect of the Change on Terms and Conditions of Employment

Under Section 8(d), where an employer seeks to proceed in a manner inconsistent with the terms of a collective-bargaining agreement that is then in effect, and if the employer's proposed action concerns a mandatory subject of bargaining, the employer must obtain the union's consent before so acting. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Tel Plus Long Island*, 313 NLRB No. 47, slip op. at 15–16 (Nov. 26, 1993).[7]

Here Conoco's use of six progression units rather than the three referred to in the agreement alters the exposure of some OT&S employees to lay off, changes some OT&S employees' chances for daylight work (as opposed to shift work), and changes some OT&S employees' opportunities for obtaining increases in base pay if Conoco does assign them to shift work. As of the date of the hearing, none of the OT&S employees had been affected in any such matter. But, plainly, seniority and its potential effect on employees' hours, pay, and risks of layoff are mandatory subjects of bargaining. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

The Provision of the Contract that Conoco is Claimed to have Violated

For the General Counsel to make out a violation of the Act here, he must show that Conoco's obligation to maintain three progression units in force is '''contained in' the contract.'' *Milwaukee Spring II*, 268 NLRB 601, 602 (1984), quoting Section 8(d). Accord: *Tel Plus*, supra. The contract term that the General Counsel and the Charging Parties point to is article 20–1. And as all of the parties agree, article 20–1 does specify three progression units, not six. But the provision begins with the following language:

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[2] Conoco admits that OCAW and Local 5-857 are labor organizations within the meaning of Sec. 2(5) of the Act. The Union represents the employees in two bargaining units at the Ponca City facility. One of the units is a small group of clerical employees. The other, with about 600 members (including the OT&S employees) is made up of—

> All operation and maintenance employees of the Refining Department, production and maintenance employees of the Lubricants Complex and the Surface Transportation Department (including transport drivers), nonprofessional laboratory employees of the Operations Technology and Support Department working in its Petroleum Products R&D Division and Analytical Services Section of the Research Services Division of the Respondent at its Ponca City, Oklahoma, facilities. Excluded: All office clerical employees, plant clerical employees in the Refinery, surveyors, chemists, professional engineers, professional employees, employees of certain represented craft units (boilermaker-welders and their helpers, electricians and their helpers, carpenters and their helpers, and bricklayers and their helpers), laboratory assistants assigned primarily to dish washing duties, guards, subforemen, labor foremen, and all other supervisors as defined in the Act.

[3] I do not consider the details of the agreement's description of the progression units to be relevant to the issues herein. Nonetheless, because the progression units are so often referred to, the progression units as described in the agreement are here set forth:

> (a) One progression unit for Technician [sic] in
> (1) Downstream Operations Support-Process Technology
> (2) Downstream Product Support and Development
> (3) Chemicals and Specialties Support-Process Development, Fluorochemical Development
> (b) One progression unit for Technicians in
> (1) Downstream Operations Support-Analytical Testing
> (2) Chemicals and Specialties Support-Analytical Support
> (c) One progression unit for Research Craftsmen in
> (1) General Services-Pilot Plant Support
> (2) Chemicals and Specialties Support-Engineering Coordination and Pilot Plant Support

[4] These are the new progression units put into place by Conoco on October 1, 1993, although, again, the issues raised by this case do not require the reader to focus on their precise description:

> (A) Downstream products support and development/-downstream operations support-process technology/general services
> (1) technician progression units
> (2) crafts progression units
> (B) downstream operations support
> (1) technician progression units
> Assigned groups [sic]
> (C) process development center
> (1) technician progression units
> (2) crafts progression units
> (D) Analytical support
> (1) technician progression units

[5] A witness for Conoco testified that the Company increased the progression units from three to six on July 1, 1993. But considerable evidence shows that testimony to be mistaken.

[6] The complaint issued on December 17, 1993, on an unfair labor practice charge filed on November 4, 1993. I heard the case in Ponca City, Oklahoma, on March 24, 1994. The General Counsel, the Respondent, and the Charging Parties have filed briefs.

[7] Sec. 8(d) provides, in part, that the duty to bargain—

> shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

The agreement contains no midterm reopener provision.

> As of April 1, 1993, the Operations Technology And Support Department shall be divided into the following progression units . . . .
>
> Conoco argues that the words ''As of April 1, 1993'' are vitally significant. What they mean, Conoco contends, is that all Conoco and the Union agreed to is that Conoco was required to have the specified progression units in place on April 1, 1993; the intent of those words, Conoco urges, was to permit the Company to use different progression units at any time thereafter. Under that reading, of course, the agreement allowed Conoco to divide OT&S into six progression units on October 1, 1993 (the action that is the subject of this proceeding).

There is no doubt that, under some circumstances, ''as of'' can have the meaning that Conoco contends it has here. That is, ''as of'' can refer to a ''specific time.'' But it also can be used ''to define a starting point.'' *PQ Corp. v. U.S.*, 652 F.2d 724, 738 fn. 18 (CIT 1987). That is to say, ''as of April 1, 1993'' can mean ''becomes effective on April 1, 1993.'' The former definition (a specific time), of course, supports Conoco; the latter, the General Counsel and the Union. Generally the words of the sentence in which ''as of'' is used make it clear which definition is intended.[8] But that is not the case here. Thus, the question to answer is what Conoco and the Union intended the term to have when they used it in the agreement.

To begin with, it is worth noting that the term was not used idly. ''As of'' shows up in the agreement only in connection with progression units. (That use of ''as of'' elsewhere than in article 20–1 will be discussed below.) In fact, with the exception of the salary schedule (which also will be discussed below), none of the other terms of the contract refer to any date at all. That is natural enough, since all the agreement's terms become effective when the agreement does, absent an indication to the contrary.

This truism itself presents a possible reason for the use of ''as of'' in article 20–1. That is, might the parties have used it to indicate that the provision should go into effect on April 1 rather than at the moment the agreement went into effect? (If so, ''As of April 1'' would have the meaning urged by the General Counsel and the Union, not that urged by Conoco.) But for four reasons it is improbable that the parties used ''as of'' for this purpose.

First, the agreement became effective at noon on March 31, a scant 12 hours before the as-of date. Second, the progression units that were in place at the time the agreement went into effect were, while differently named, substantively identical to the progression units specified in the agreement. Third, the term ''as of'' was used in the progression unit provision of the first collective-bargaining agreement between Conoco and the Union and has been used in each collective-bargaining agreement since then. That suggests that the parties' intent in using the term in this agreement was the same as it was in 1971. And in that first agreement, the progression unit provision begins ''As of April 30, 1971,'' which is precisely the date that that first agreement went into effect. And fourth, in the two places in the agreement where the parties unambiguously intended to communicate ''becomes effective,'' they said so, using the word ''effective.'' That is so on the cover page of the agreement (''effective noon, March 31, 1993'') and in the salary schedule (''effective 04/01/93''; ''effective 04/01/94''; and ''effective 04/01/95).''

That last consideration—the agreement's use of the term ''effective'' where the parties wanted to indicate ''becomes effective''—seems to me to be particularly significant. There is always the possibility that the agreement's use of both ''as of'' and ''effective'' is merely a product of sloppy draftsmanship and that both are intended to mean ''becomes effective.'' But the more reasonable assumption is that ''as of'' and ''effective' are not used as synonyms. And under that assumption, ''As of April 1, 1993'' does not mean ''Becomes effective on April 1, 1993.'' That, in turn, suggests that, as used in the agreement, ''As of April 1, 1993'' is intended to mean something like ''On April 1, 1993, but not necessarily thereafter.''

As touched on earlier, ''as of'' does show up elsewhere in the agreement—in a provision under the heading ''layoff and recall.'' The provision, article 8–4, reads, in pertinent part:

> Employees in the progression units listed in Article 20–1 as of April 30, 1971, will be for demotion purposes, ranked in a composite listing . . . .

As noted above, the first Conoco-Union collective-bargaining agreement was effective April 30, 1971, and the progression unit provision of that agreement begins ''As of April 30, 1971.'' Presumably, therefore, the ''as of April 30, 1971'' language in article 8–4 of the current agreement resulted from the parties mindlessly copying and recopying the language of the first agreement as the years rolled by. Thus, for example, article 8–4 of the 1990–1993 Conoco-Union agreement uses exactly the same language as that quoted from article 8–4 of the 1993–1996 agreement.[9] In any case, the quoted part of article 8–4 is gibberish because of the reference to the 1971 date and thus adds nothing to a determination of what ''as of'' means in article 20–1 of the agreement. (The layoff and recall provisions of the 1993–1996 agreement refer a few additional times to the April 30, 1971 date; all such references appear to be mistakes; none is of any use in helping to solve the meaning of ''as of April 1, 1993.'')

One remaining question is why the parties would negotiate a seniority provision that was binding only on 1 day. In that connection I turn to the agreement's management' rights provision, article 11. It reads, in part:

[8] For references to ''as of'' in which the context shows that a particular date was being referred to, see *U.S. v. Munro-Van Helms Co.*, 243 F.2d 10, 12–13 (5th Cir. 1957) (involving a collective-bargaining agreement that stated that ''The employee's right to a vacation shall accrue as of July 1.''); 13 U.S.C. § 141(a), the predecessor of which is discussed in *City of Twin Falls v. Koehler*, 123 P.2d 715 (Sup.Ct. Idaho 1942) (''The Secretary [of Commerce] shall, in the year 1980 and every ten years thereafter, take a decennial census of the population as of the first day of April of such year.'') For an example of a context that makes it clear that ''as of'' refers to a starting date, see the usage example of ''as of'' in Webster's Third New International Dictionary (1981): ''the rule takes effect as of July 1.''

[9] The record does not contain a copy of the analogous provision of the 1971 agreement.

> It is . . . the responsibility of management to determine and to redetermine the organization of the Petroleum Products Division and/or the Analytical Research Section of [OT&S] including but not limited to its location, relocation, types of operation; and to determine the methods, processes and materials to be employed; to discontinue in whole or in part processes or operations or to discontinue their performances by employees of [OT&S] or of the Company; to transfer either within or without the Company any work, technology, equipment or process performed by employees covered by this Agreement.[10]

For reasons I will discuss later in this decision it is my conclusion that, if one ignores the ''as of'' language of article 20–1, article 11 ought not to be read as permitting management to alter the specified progression units. But the provision does show that Conoco has an abiding interest in being able to ''redetermine the organization'' of OT&S without first obtaining the Union's consent. (Indeed, while the agreement generally provides for the arbitration of grievances, the agreement precludes grievances over the interpretation of article 11 from being submitted to arbitration.) In many circumstances, plainly, a reorganization of OT&S would be cumbersome without a rearrangement of the OT&S progression units. Thus the ''as of'' language of article 20–1 can be understood as a way of effectuating Conoco's interest in being able to rearrange all facets of OT&S whenever it chooses while, at the same time, honoring what surely would be an interest of the Union in specifying the progression units the parties contemplated as being in effect as the contract term got underway.

For the foregoing reasons, I conclude that, as used in the agreement, ''As of April 1, 1993,'' does not mean ''becomes effective on April 1, 1993,'' but instead was intended to indicate that Conoco was not bound to maintain the specified progression unit arrangement after April 1, 1993.

In *NCR Corp.*, 271 NLRB 1212, 1213 (1984), the Board considered the question of whether the Respondent violated Section 8(d) when it moved certain kinds of jobs from one location to another. The collective-bargaining contract could be read as precluding the employer from doing that (unless the company first obtained the union's consent). But the contract also could be read as granting the employer that leeway. The Board concluded that

> [W]e find that [the employer's] implementation of the work transfers was in accordance with its reasonable interpretation of the parties' contract. . . . The Board is not compelled to endorse either of these two equally plausible interpretations of the contract's operation in this case. The present dispute is solely one of contract interpretation. As the Board has stated in *Vickers, Inc.*, 153 NLRB 561, 570 (1965), when ''an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,'' the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.

As discussed above, for the General Counsel to show that Conoco violated Section 8(d) of the Act, he must show that article 20–1 precluded Conoco from switching from three progression units to six. I have concluded that in fact article 20–1 does not have the effect. In any case, in the very least article 20–1 is susceptible to two readings, only one of which supports the General Counsel and the Union. Accordingly, in light of *NCR Corp.*, supra, I further conclude that Conoco has not been shown to have violated Section 8(d) of the Act.[11]

The foregoing considerations do, on their face, raise another issue: that of whether Conoco's use of changed progression units violated Section 8(a)(5). If ''As of April 1, 1993'' means ''on April 1, 1993,'' that is, then the collective-bargaining agreement can be read as being silent about what progression units can be put into place thereafter. And if that reading applies, the Act requires Conoco to have bargained in good faith either to agreement or to impasse. E.g., *Tel Plus*, supra.

But the General Counsel litigated this case entirely on the basis that Conoco's actions violated Section 8(d). Thus, for example, while the parties did introduce evidence of bargaining between Conoco and the Union about the change in progression units, no party sought to prove that Conoco and the Union were, or were not, at an impasse when Conoco effected the change on October 1. Under these circumstances, and because I have concluded that Conoco has not been shown to have violated Section 8(d), I shall recommend that the complaint be dismissed.

Other Considerations

My recommendation that the complaint be dismissed hinges entirely on my reading of the one phrase, ''as of April 1, 1993.'' As the Board's reading of the phrase may be different from mine, I am going to consider the parties' other contentions about why Conoco's change in progression units did or did not violate Section 8(d). Thus, in this part of this decision I shall proceed on the assumption that article 20–1, standing alone, means that from April 1, 1993, until the expiration of the agreement in 1996 Conoco was required to utilize the progression units specified in that article.

I turn first to matters pertaining to the agreement's management-rights provision, article 11.

As described by a Conoco official, Francis Sage, Conoco's OT&S department is divided into managerial or operational ''substructures.'' These substructures are divisions (of the OT&S department), sections (of the divisions), and groups (of the sections). As already discussed, OT&S is also divided into progression units. More specifically, the agreement refers to two ''technician progression units'' and one ''research craftsman progression unit.''[12]

The progression units are ''basically a seniority system'' for the employees in OT&S,'' in the words of a long-time

[10] The provision refers to the ''Research Services Division'' rather than OT&S. But that division was the predecessor of OT&S. At present there is no ''Research Services Division.''

[11] If there were evidence that the Conoco actions at issue were a product of animus, bad faith, or an intent to undermine the Union, different considerations would apply. *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988). But that is not the case.

[12] See fn. 3, supra, for a more detailed description of the progression units.

OT&S employee. That description of the progression units is supported by the collective-bargaining agreement itself, which sets out the progression units in an article entitled ''Seniority.''

Unsurprisingly, the shape that the progression units have taken over the years has been related to the work of the OT&S department and to the organizational substructures within that department. Thus (as Sage testified), the progression units have ''generally [been] aligned with [OT&S'] divisions and/or sections.''

All this brings us to the agreement's management-rights provision which, as already touched on, provides that it is management's ''responsibility'' to, among other things, ''determine and to redetermine the organization'' of OT&S.

I will assume that by that provision Conoco may unilaterally rearrange OT&S' divisions, sections, and groups, as the Company sees fit, even if doing so affects the terms and conditions of OT&S' employees. See, e.g., *United Technologies*, 274 NLRB 609, 620–622 (1985). But it is one thing to redetermine the organization of OT&S; it is quite another to rearrange the order of employee seniority. And, as just discussed, the progression units are ''basically a seniority system.''

It was up to Conoco to prove that the agreement's management-rights provision is intended to give Conoco the right to alter the OT&S employees' seniority system. See *Johnson-Bateman Co.*, 295 NLRB 180 (1989). Because the management-rights provision does not specify that it applies to progression units, because there is a reasonable reading of the provision by which it does not apply to progression units, and because there no is evidence that in negotiating the 1993–1996 agreement the parties intended the provision to apply to progression units, I conclude that the provision does not override the requirements of article 20–1 of the Conoco-union collective-bargaining agreement.

Conoco also points to articles 26-5 and 26-6 of the collective-bargaining agreement. (Art. 26 is entitled ''Staffing.'') Those provisions read:

> 26-5 When one or more progression units in whole or in part are combined with one or more other progression units, employees shall be ranked in the surviving progression unit on the basis of their regular, full-time employment date in the Operations Technology and Support Department. . . .
>
> 26-6 When the Company has determined that conditions exist which necessitate the application of Article 26-5, they [sic] will meet with the Union to explain the situation.

Article 26 appears to entitle Conoco to combine progression units without the Union's consent. But it says nothing about splitting progression units, which is the action of concern to us here. Conoco argues that if the Company has the right to combine progression units, it surely must also have the right to split them. But combining seniority lists has effects very different from splitting them. Thus, I consider Conoco's argument entirely unpersuasive. Indeed, the fact that the agreement refers to combining progression units but says nothing about splitting progression units might be construed as an indication that the possibility of Conoco having the right to split progression units was considered in the course of negotiating the agreement (or one of its predecessors) and rejected.

Each of the parties points to various other language of the 1993–1996 agreement as supporting the contention that Conoco did, or did not, have the right to change the progression units without the Union's consent. For example the General Counsel points to articles 3 (entitled ''exclusive agreement'') and 8-3 (relating to procedures in the event of a reduction in force), while Conoco focuses on provisions relating to transfers of employees, assignment of jobs, and the movement of jobs from one division to another. But I do not consider any of the cited language as indicating anything about whether Conoco has the right to alter progression units without the consent of the Union.

Finally, Conoco argues that its history of making midterm changes in progression units proves that it has the right to make such changes without the consent of the Union. And, indeed, Conoco has made such midterm changes. But the history of those changes shows only that: (1) on one occasion Conoco combined progression units without first obtaining the Union's consent (which, as just discussed, art. 26 specifically permits); and (2) on the one occasion (prior to 1993) where the Company split progression units, the Union consented to it.

In sum, I conclude that if one puts aside the ''as of'' language of article 20–1, then Conoco's action on October 1, 1993—that of altering the progression unit arrangement then in effect—was contrary to the Company's obligations under the Company's collective-bargaining agreement with the Union.

The Change in the Scope and Direction of Conoco's Business

In the period 1992–1993 Conoco's management undertook a massive investigation into the direction the Company should take in the future. Conoco contends that the study caused Conoco's management to change the scope and direction of the Company's business and that the October 1, 1993 revamping of OT&S' progression units was a result of this change in scope and direction of Conoco's business. (I precluded Conoco from introducing much evidence purportedly going to prove this contention.) Additionally, this contention continues, management's decision to change the progression units was unrelated to concerns about labor costs. Citing *First National Maintenance*[13] and *Otis Elevator II*,[14] Conoco goes on to argue that because a change in the scope and direction of the business was the basis for the change in progression units, Conoco could properly make the change even assuming that the change would otherwise violate the Act.

But *First National Maintenance*, *Otis Elevator II*, and their progeny are about changes in business scope and direction that result in the elimination of an operation (and the jobs connected with that operation) or the transfer of work from one location to another. Here, in contrast, technicians and craftsmen employed at Conoco's Ponca City facility prior to the change continued to be employed as technicians and craftsmen at the Ponca City facility after the change. And what is at issue is a term of a collective-bargaining agree-

[13] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[14] 269 NLRB 891 (1984).

ment covering seniority among such employees, including, in the words of *First National Maintenance*, ''the order of succession of layoffs.'' 452 U.S. at 677. Under these circumstances nothing in either *First National Maintenance* or *Otis Elevator II* permits Conoco to act contrary to the terms of the Conoco-Union agreement.

[Recommended Order omitted from publication.]